THE PROSECUTOR'S MANUAL
VOLUME I CHAPTER 5
OTHER ACTS

Table of Contents

I. Introduction to Other Acts 1

A. Scope 1

B. The Rule 2

C. Manner and Sufficiency of Proof of Bad Acts 3

1. Prior Convictions: Impeachment and Sentence Enhancement 3

2. Proof of Bad Acts 3

3. Other Crimes and Burden of Proof 4

D. Good Acts - Religion 4

E. Simultaneous and Subsequent Bad Acts 4

F. Rule 404(b) and Prior Case Law 4

G. Severance - Joinder 5

H. Acquittal or Dismissal of Other Act 5

I. Entrapment and Bad Acts 5

J. Insanity and Bad Acts 5

K. Error: Harmless, Invited, Reversible, Etc. 6

L. Witness Preparation 7

M. Remoteness 7

N. Conspiracy 7

O. Character, Reputation, and Opinion 7

II. Exceptions: Rationale and Examples 8

A. Sex Crimes 8

1. Victim's Sexual History 8

2. Rape Trauma Syndrome 8

3. Child Sexual Assault Syndrome 8

4. Child Abuse Syndrome....8
5. Defendant's Sexual History....8
B. Complete Story – *Res* Gestae....9
C. Motive....9
D. Identity, Plan....9
E. Intent, Preparation, Lack of Mistake or Accident, Knowledge....11
III. Cases....12
A. Error: Harmless, Invited, and Reversible....12
B. Sex Crimes....13
1. Victim's Sexual History....13
2. Use of Bad Acts to Show Emotional Propensity for Sexual Deviance....13
C. Complete Story....15
1. Acts of Defendant....15
2. Complete Story (Acts of Others)....18
D. Entrapment....18
E. Subsequent Acts....19
F. Motive....20
G. Identity, Plan....21
H. Intent, Preparation, Lack of Mistake or Accident, Knowledge....22

I. INTRODUCTION TO OTHER ACTS

A. Scope

The term "other acts" in general covers many different facets of the law including prior convictions, prior crimes, etc. This section of the manual deals only with acts independently admissible, generally pursuant to Rule 404(b) of the Arizona Rules of Evidence. The remaining portions of other acts, such as prior convictions for Rule 609 impeachment or for enhanced punishment, will be covered in other sections.

Prior acts are a type of character evidence, and are treated in the character evidence rule. Character evidence and reputation and opinion will be discussed later in this chapter. The main thrust is other bad acts. A good quote to keep in mind throughout this chapter is found in *State v. Greenawalt,* 128 Ariz. 150, 624 P.2d 828 (1981). "Evidence is not inadmissible simply because it paints a black picture of defendant's character or his bent for evil." 624 P.2d at 846.

The term "other acts", specifically "other crimes, wrongs, or acts," is a term of art. They include acts that are not criminal in and of themselves. For instance defendant asked a young boy to go with him in his truck to do yard work. There was absolutely no crime committed. Nevertheless, the invitation was admitted as a "prior bad act" under Rule 404(b) to prove a common plan or scheme and to rebut a defense of lack of premeditation. The next day in the same area defendant used the same line to pick up two boys, raped them and killed one of them. *State v. Castaneda,* 150 Ariz. 382, 724 P.2d 1 (1986). As is discussed *infra,* "prior bad acts" can also include simultaneous or subsequent "bad acts".

> The list of 'other purposes' in rule 404(b), for which other crime may be shown, is not exclusive; if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts. *State v. Tuell,* 112 Ariz. 340, 541 P.2d 1142 (1975); *State v. Thompson,* 110 Ariz. 165, 516 P.2d 42 (1973); *State v. Jones,* 26 Ariz. App. 68, 546 P.2d 45 (Div.1 1976); *see generally State v. Meraz,* 152 Ariz. 588, 734 P.2d 73 (1987) (Rule 403 did not bar pornographic magazine containing defendant's fingerprints which linked him to rape); *United States v. Barrett,* 539 F.2d 244 (1st Cir. 1976). The trial judge must determine whether the probative value of the disputed evidence is [substantially*] outweighed by the danger of unfair [emphasis supplied] prejudice; if so the evidence must be excluded.

State v. Jeffers, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983), cert. denied 104 S.Ct. 199 (1983). See also *State v. Cannon*, 148 Ariz. 72, 713 P.2d 273 (1985).

The Arizona cases rarely emphasize both elements of the Rule 403 test, that the danger of **UNFAIR** prejudice must **SUBSTANTIALLY** outweigh the probative value before the evidence should be excluded. *State v. Meraz,* 152 Ariz. 588, 734 P.2d 73 (1987) is just one example where the court said probative evidence should be excluded if it was substantially outweighed by the danger of prejudice. Prosecutors should remember both parts of the test, "substantially outweighed" by the danger of "unfair prejudice."

A defendant is entitled to an instruction limiting the use of the other act evidence. If defendant is given several chances to submit such an instruction and fails to do so, failure to give such an instruction has been held not to be error. *State v. Mincey,* 141 Ariz. 425, 687 P.2d 1186 (1984). The prosecutor may want to offer such an instruction, to avoid appellate questions. See generally *State v. Meraz*, 152 Ariz. 588, 734 P.2d 73 (1987).

This chapter is divided into three sections. The first contains general material, applicable to all the exceptions. The second section briefly discusses the major exceptions and gives examples of each, but does

not list a lot of cases. The third contains additional cases for most of the exceptions.

NOTE: While this manual and many prosecutors commonly refer to this category of acts as "bad acts," the rule specifically refers to them as "other crimes, wrongs, or acts." Be sure to use the appropriate language.

B. The Rule

The text of Rule 404(b) states:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The general rule is that evidence of other crimes or bad acts is not admissible to prove the defendant committed the crime charged. See *State v. Correll,* 148 Ariz. 468, 715 P.2d 721 (1986). The rationale is that if bad acts are admitted to show defendant is a bad man, the jury may convict on lesser evidence. *State v. Swinburne,* 116 Ariz. 403, 569 P.2d 833 (1977); *State v. Babineaux,* 22 Ariz.App. 332, 526 P.2d 1277 (App.Div.1 1974).

Four main provisions of the Rules of Evidence determine when other act evidence will be permitted:

1. Rule 404(b) requires that it be for a proper purpose.

2. Rule 402 requires that it be relevant to the charge at issue.

3. Rule 403 requires that prejudicial nature not outweigh its probative value.

4. Rule 105 requires that the judge give a limiting instruction upon request.

See *State v. Coghill*, 216 Ariz. 578, 169 P.3d 942 (App.Div.2 2007).

There are numerous exceptions to the rule and one of the most obvious is where the bad act is an element of the crime charged, such as a felon with a firearm. *State v. Via,* 146 Ariz. 108,. 704 P.2d 238 (1985) cert. denied, 106 S.Ct. 1268 (1986). See also *State v. Rosthenhausler,* 147 Ariz. 486, 711 P.2d 625 (App.Div.2 1985) (seizure of illegal shotgun explained why handgun used in later robberies). Arizona Rules of Evidence Rule 404(b) codifies many of the exceptions with which this section is concerned. Rule 404(b) is an inclusionary rule that admits evidence of bad acts relevant under Rule 401, except where it tends to prove only criminal disposition. *United States v. Young*, 573 F.2d 1137 (9th Cir. 1978); *United States v. Rocha*, 553 F.2d 615 (9th Cir. 1977); *State v. Passarelli*, 130 Ariz. 360, 636 P.2d 138 (App.Div.2 1981).

Many of the other bad act exceptions fit more than one category. Evidence admissible to complete the story may also reveal motive. *State v. Collins,* 111 Ariz. 303, 528 P.2d 829 (1974). The appellate courts have had no problem finding bad act evidence admissible under several theories. *State v. Mincey,* 130 Ariz. 389, 636 P.2d 637 (1981). Never rely on just one theory to get the evidence admitted, if by any leap of the imagination you can come up with a second or fifth theory to get it admitted. Put your theories on the record. If the trial court rules against you, and you decide to appeal, the only theories considered on appeal will be the theories raised below in the trial court. See generally *State v. Junkin,*

123 Ariz. 288, 599 P.2d 244 (App.Div.2 1979).

The rule against admission of prior bad acts is, essentially, a relevance test. If the evidence has no relevance, it merely shows defendant is a bad person and admission of the evidence may be reversible error. *State v. Bojorquez,* 151 Ariz. 611, 729 P.2d 965 (App.Div.1 1986). If the evidence is relevant, then the Rule 403 test must be applied to the evidence to see if the prejudice outweighs the probative value. See *State v. Cannon*, 148 Ariz. 72, 713 P.2d 273 (1985); see also *State v. Sanchez,* 130 Ariz. 295, 635 P.2d 1217 (App.Div.2 1981).

Example 1: The court committed reversible error when, in a case of aggravated assault with a deadly weapon, it permitted the prosecutor to introduce evidence of an independent assault on the same victim with a broken hoe handle. This evidence did not "tend to prove any of the elements for which the defendant stood charged" and its effect was not harmless. *State v. Wargo,* 140 Ariz. 70, 73, 680 P.2d 206, 209 (App.Div.2 1984).

Example 2: Admission of evidence that defendant, who was charged with robbery of a store, subsequently stole gas from the store was error. *State v. Dugan,* 125 Ariz. 194, 608 P.2d 771 (1980).

Example 3: Reference to a mug shot is reversible error even though the defense attorney doesn't object. *State v. Cross,* 123 Ariz. 494, 600 P.2d 1126 (App.Div.2 1979).

This discussion assumes that the defense is objecting to the bad act evidence. If the defense does not object, all error but fundamental error is waived. *State v. Mincey,* 130 Ariz. 389, 636 P.2d 637 (1981). See also *State v. Schrock*, 149 Ariz. 433, 719 P.2d 1049 (1986).

C. Manner And Sufficiency Of Proof Of Bad Acts

1. Prior Convictions: Impeachment and Sentence Enhancement

Prior convictions are covered in the impeachment subsection of the Cross-Examination chapter. Prior convictions for sentence enhancement are covered in the Sentencing chapter.

2. Proof of Bad Acts

Almost any method of proof consistent with the Arizona Rules of Evidence is sufficient for proving bad acts not amounting to other crimes.

Example 1: After the crippled defendant fell down in a bar, someone asked him what he would do if he were ever in trouble or needed help. A bartender was allowed to testify at defendant's murder trial that he replied he always carried a weapon in his truck and would kill anyone who messed with him. The statement showed defendant's state of mind when he used his truck later to chase down a trespassing van, then shot the driver of the van with a "shotgun pistol". *State v. Dickey,* 125 Ariz. 163, 166, 608 P.2d 302, 305 (1980).

Example 2: The victim could testify about quarrels and physical abuse, resulting in her calling the police four times prior to the day in question, and could testify that just before defendant stabbed her he told her she wouldn't call the police again, she would call on Jesus Christ. The evidence completed the story of the crime (*res*

cestae) and showed defendant's state of mind at the time of the assault with a deadly weapon, especially regarding his later claim of self-defense. *State v. Patterson*, 4 Ariz.App. 265, 419 P.2d 395 (1966).

3. Other Crimes and Burden of Proof

Again, almost any method of proof consistent with the Arizona Rules of Evidence is acceptable as long as there is substantial evidence of the other crime. See *State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312 (1984) (evidence of a crime committed in another state was admissible to show identity in a related crime); see generally *State v. Jackson*, 121 Ariz. 277, 589 P.2d 1309 (1979); *State v. Bridges*, 123 Ariz. 452, 600 P.2d 756 (1979). Conflicting evidence is sufficient proof. See generally *State v. Featherman*, 133 Ariz. 340, 651 P.2d 868 (App.Div.1 1982).

Example 1: Evidence that the defendant hit the victim over the head with a baseball bat two months prior to her disappearance was admissible to show defendant's hostility toward the victim and his intent on the night she was murdered. "Intent is frequently shown by evidence of other criminal acts of the same character." *Featherman, supra* at 345, 651 P.2d at 873. See also *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180 (1984), cert. denied, 105 S.Ct. (1984).

Example 2: Eyewitness testimony that defendant robbed an out-of-state bowling alley was admissible to prove identity in his prosecution for robbing two Arizona bowling alleys, using the same method. *State v. Brown,* 125 Ariz. 160, 608 P.2d 299 (1980).

Example 3: Where the only evidence supporting 57 other bad acts involving three other victims was improperly admitted hearsay, defendant's convictions on the charged credit card frauds was reversed. *State v. McGann,* 132 Ariz. 296, 645 P.2d 811 (1982).

Example 4: The appellate court held that the prosecution did not have to meet the substantial evidence rule since the prior bad acts were not being introduced during the State's case-in-chief. The prior bad acts were either stricken, elicited by defense attorneys or were non-responsive. *State v. Wilson,* 134 Ariz. 551, 658 P.2d 204, (App.Div.1 1982).

D. Good Acts - Religion

Generally, defendant may not introduce evidence of his religion in order to bolster his defense. *State v. Marvin,* 124 Ariz. 555, 606 P.2d 406 (1980), nor may the State question a defendant or witness about the witness's religion. See generally *State v. Crum*, 150 Ariz. 244, 722 P.2d 971 (App.Div.2 1986).

E. Simultaneous And Subsequent Bad Acts

Under Rule 404(b) there is no difference between prior bad acts, simultaneous bad acts, and subsequent bad acts. The tests applied are the same. See *State v. Jackson*, 124 Ariz. 202, 603 P.2d 94 (1979); *State v. Encinas,* 132 Ariz. 493, 647 P.2d 624 (1982) (footnote 4); see generally *State v. Anderson*, 128 Ariz. 91, 623 P.2d 1247 (App.Div.1 1981).

F. Rule 404(b) And Prior Case Law

The standard governing the admissibility of evidence of prior wrongs is set forth in 17A A.R.S. Rules of Evidence rule 404(b) (Supp. 1979). Although embellishing the principle somewhat, Rule 404(b) has not significantly altered the rule existing prior to

its 1977 adoption, see *State v. Moore*, 108 Ariz. 215, 495 P.2d 445 (1972), and we therefore find the previous case law in this area, where not inconsistent, to be controlling.

State v. Brown, 125 Ariz. 160, 160, 608 P.2d 299, 299 (1980). *State v. Castaneda,* 150 Ariz. 382, 724 P.2d 1 (1986) (Rule 404(b) "was based on previous case law.").

G. Severance - Joinder

Joinder and severance motions come under Rule 13.3 and 13.4 of the Arizona Rules of Criminal Procedure. The annotations to these rules provide another source of case law for the prosecutor. *State v. Dale,* 113 Ariz. 212, 550 P.2d 83 (1976) is an example of how, if the Rule 13 references were changed, the discussion would sound like a Rule 404 decision. Prepare carefully for whichever motion is being heard first, joinder or bad act, because winning one will win the other and vice versa. See *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *State v. Ferguson*, 120 Ariz. 345, 586 P.2d 190 (1978).

H. Acquittal Or Dismissal Of Other Act

Generally, evidence of another crime for which defendant has been acquitted is inadmissible. *State v. Little,* 87 Ariz. 295, 350 P.2d 757 (1960). However, if the defendant does not object to admission of the other bad acts, he is entitled to introduce evidence that he was acquitted of the other bad acts. *State v. Davis,* 127 Ariz. 285, 619 P.2d 1062 (App.Div.2 1980).

The prosecution can introduce evidence of other bad acts for which charges were dismissed with prejudice. *State v. Swinburne,* 116 Ariz. 403, 569 P.2d 833 (1977). Use of another act for which defendant is subsequently acquitted did not require reversal in *State v. Miller,* 115 Ariz. 279, 564 P.2d 1246 (1977). An opening statement mentioning that defendant traded marijuana for the stolen guns he was charged with possessing was not reversible error, even though possession of marijuana was not charged and defendant was acquitted of possessing the stolen guns. *State v. Jones,* 124 Ariz. 284, 603 P.2d 555 (App.Div.2 1979).

If defendant calls witnesses who face charges as a result of the crime, the State must be allowed to bring out the charges on cross-examination. If the witnesses have been acquitted of the charges, and the State asks about the charges, the defense is entitled to show the acquittals, to rebut an inference that the witnesses had a motive to testify falsely. *State v. Farmer,* 126 Ariz. 569, 617 P.2d 521 (1980).

I. Entrapment And Bad Acts

If defendant raises the entrapment defense by taking the stand and admitting all the elements of the offense, see *State v. Montano,* 117 Ariz. 145, 571 P.2d 291 (App.Div.2 1977), the State may introduce evidence of other bad acts to show intent and predisposition. *State v. Korte,* 115 Ariz. 517, 566 P.2d 318 (App.Div.2 1977) (predisposition); *State v. Astorga,* 26 Ariz.App. 133, 546 P.2d 1142 (App.Div.2 1976) (intent). Defendant must affirmatively admit the elements of the crime; if the State refuses to stipulate, the defense attorney must do something affirmative like reading defendant's admission of the elements to the jury. *State v. Nilsen,* 134 Ariz. 431, 657 P.2d 419 (1983) (make that stipulation good).

J. Insanity And Bad Acts

When the defense of insanity is raised, the State may use all prior relevant conduct of the defendant's life. *State v. Torres*, 127 Ariz. 309, 620 P.2d 224 (App.Div.2 1980); *State v. Skaggs,* 120 Ariz. 467, 586 P.2d 1279 (1978). See the chapters on competence and insanity in Volume IV of the Prosecutor's

Manual Series for a complete discussion.

K. Error: Harmless, Invited, Reversible, Etc.

Whether or not error was committed in admission of the bad acts in question is usually decided on a case by case basis. Factors considered will probably include the prejudicial effect of the evidence, the strength of the case against defendant, the admonitions given, and the objections made by defendant. (Please note that this list is not exhaustive.) If admission of the bad acts were error it may be reversible error.

Example 1: "(1) When the facts are weighed, is it clear beyond a reasonable doubt that the defendant is guilty as charged?

(2) Did the error contribute to the guilty verdict and if so to what degree?

(3) If the Chapman-Harrington test is satisfied, do public policy reasons require reversal?"

Under these criteria, remarks by a prosecution witness about defendant's probation and massage parlor business were harmless error. *State v. Salzman,* 139 Ariz. 521, 524, 679 P.2d 544, 547 (App.Div.2 1984) citing *State v. Devaney*, 18 Ariz.App. 98, 500 P.2d 629 (App.Div.2 1972). The Chapman-Harrington test is a basic test of harmless error. See *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967), and *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726 (1969).

Example 2: Admission of a subsequent burglary was harmless error where the jury was instructed it could not convict defendant merely because they thought he had committed some other crime, the evidence was overwhelming and the evidence of the subsequent crime was relatively nonprejudicial compared to the charged crimes. *State v. Jackson,* 124 Ariz. 202, 603 P.2d 94 (1979). See *State v. Watkins,* 126 Ariz. 293, 614 P.2d 835 (1980).

Example 3: Remarks of a prosecution witness that he knew defendant was on probation for similar incidents with another female, and that the defendant was in the massage parlor business were held to not be reversible error. *State v. Salzman,* 139 Ariz. 521, 679 P.2d 544 (App.Div.2 1984).

If defendant elicits bad acts, the doctrine of invited error may apply. Defendant cannot admit evidence of bad acts, or try to elicit evidence of bad acts, and then complain if the State uses the bad acts that he elicited. Circumstances may entitle the prosecutor to elicit bad act evidence not otherwise admissible. One caveat: make sure what the defense attorney opened was a door, not a trapdoor.

Example 1: The prosecutor committed technical error when he asked defendant whether he raped his estranged wife; however, it was invited error, since the prosecutor was attempting to refute the defense theory that the two were reconciled and therefore defendant had provocation to kill a man that he caught in bed with his wife. *State v. Evans,* 124 Ariz. 526, 606 P.2d 16 (1980).

Example 2: Testimony the witness told a police officer that defendant had killed someone was admissible to show the witness was afraid of defendant, and to discredit the co-participant's trial testimony that defendant was not involved in the crime. (Careful, a limiting instruction would be a wise idea.) *State v. Vaughan,* 124 Ariz. 163, 602 P.2d 831 (App.Div.2 1979). But, the instance cannot be a later crime. *State v. Burciaga*, 146

Ariz. 333, 705 P.2d 1384 (App.Div.1 1985).

The defense exploring improperly admitted bad acts testimony has constituted waiver of any error in the admission of that evidence. *State v. Sanchez,* 116 Ariz. 118, 568 P.2d 425 (App.Div.2 1977).

One enterprising prosecutor and assistant attorney general helped the courts involved see that the evidence of prior bad acts actually helped defendant. The jury might have believed that defendant drove back roads to the murder scene because he intended to commit murder. However, defendant's two DWI convictions also explained the back roads route to the rape/murder scene. *State v. Miller,* 135 Ariz. 8, 658 P.2d 808 (App.Div.1 1982). See also *State v. Watkins*, 133 Ariz. 1, 648 P.2d 116 (1982) (cop seeing defendant drunk before supported alcoholic intoxication defense).

L. Witness Preparation

If the prosecutor loses the motion to admit bad acts, instructing the witness not to mention the bad acts unless the defense attorney has clearly asked for the bad acts is a good idea. See generally *State v. Brewer,* 110 Ariz. 12, 514 P.2d 1008 (1973). In any case, witness preparation is a good idea, it may prevent errors like the investigating officer referring to a simple robbery as an armed robbery. *State v. Dugan,* 125 Ariz.194, 608 P.2d 771 (1980) (reversible error).

M. Remoteness

Remoteness is comparative, so the trial court is given substantial latitude in determining what is or is not stale. Remoteness in time of similar acts, if otherwise admissible, generally affects the weight and probative value, not the admissibility, of the evidence. Held: sale of several papers of heroin 4 to 7 years earlier does demonstrate a predisposition to sell in 1976. *State v. Korte*, 115 Ariz. 517, 566 P.2d 318 (App.Div.2 1977). "The admissibility of such testimony is not measured by remoteness in time, rather, the length of time is a factor to be considered by the jury in determining the weight of the evidence." *State v. Jeffers*, 135 Ariz. 404, 418, 661 P.2d 1105, 1119 (1983).

N. Conspiracy

Statements of co-conspirators are independently admissible if they are made during the course and in furtherance of the conspiracy. *State v. Viertel,* 130 Ariz, 364, 636 P.2d 142 (App.Div.2 1981). There is no need to resort to the bad acts rule if a conspiracy is involved, although the evidence may be admissible under both theories. See generally *State v. Agnew*, 132 Ariz. 567, 647 P.2d 1165 (App.Div.2 1982).

O. Character, Reputation and Opinion

Character evidence is generally inadmissible unless it is a pertinent character trait offered by the defendant, or rebuttal character evidence offered by the prosecution. Rule 404(a)(1). Pertinent character traits of the victim are likewise admissible, with the added provision that that the prosecutor may introduce evidence the victim was peaceful to rebut the defense that the victim was the initial aggressor. Rule 404(a)(2). Witnesses may be impeached under Rule 607, 608, and 609. Rule 404(a)(3). Character evidence may be proven "by testimony as to reputation or by testimony in the form of an opinion." The cross-examiner may ask about relevant "specific instances of conduct." Rule 405(a). If "character or a trait of a person is an essential element of a charge, claim or defense, proof may also be made by specific instances of conduct." Rule 405(b).

The evidence must be relevant. Here, defendant wanted to introduce the murder victim's reputation for violence. The Arizona Supreme Court upheld the trial court's refusal because the defense was that defendant did not commit the crime. *State v. Santanna,* 153 Ariz. 147, 735 P.2d 757 (1987). Likewise,

without the requisite showing, defendant was not entitled to a fishing expedition into a correction officer's personnel file, looking for specific instances of misconduct or untruthfulness. *State v. Cano,* 154 Ariz. 447, 743 P.2d 956 (App.Div.2 1987).

Proving the testifying accomplice had no criminal record showed why the accomplice was admitted to a diversion program. The evidence did not impliedly tell the jury defendant had a criminal record. *State v. Updike,* 151 Ariz. 433, 728 P.2d 303 (App.Div.2 1986).

Cross-examination is not a license for the defendant to run "at large in cross-examination." Defendant failed to meet his Rule 103 burden and the trial court did not err when it barred defendant from asking his wife about her marital history, illegitimate child, letter to him in jail, conduct with other men while he was jailed and whether she stole his truck. *State v. Adams,* 155 Ariz. 117, 121, 745 P.2d 175, 179 (App.Div.1 1987).

II. EXCEPTIONS: RATIONALE AND EXAMPLES

A. Sex Crimes

Sex crimes are covered in detail in the Sexual Assault chapter in Volume IV of the Arizona Prosecutor Manual Series. Here is a fast synopsis of cases from that chapter.

1. Victim's Sexual History

The use of the victim's history is barred, with certain exceptions, by *State ex rel Pope v. Superior Court,* 113 Ariz. 22, 545 P.2d 946 (1976). The best case to cite for keeping such irrelevant data out is *State v. Cook,* 151 Ariz. 205, 726 P.2d 621 (App.Div.2 1986). *Cook* says *Pope* "held that sexual misconduct is not probative of truthfulness." *Id.* at 205, 621. If the defendant is able to fit within one of the *Pope* requirements, the evidence is admissible only if defendant has complied with certain procedures. *State v. Quinn,* 121 Ariz. 582, 592 P.2d 778 (App.Div.1 1978).

2. Rape Trauma Syndrome

Rape Trauma Syndrome evidence is admissible to prove lack of consent, but not that a rape happened. *State v. Huey,* 145 Ariz. 59, 699 P.2d 1290 (1985).

3. Child Sexual Assault Syndrome

Child sexual assault trauma testimony is admissible, but the expert may not quantify the probability a witness is telling the truth, nor that the testimony is consistent with abuse having occurred. *State v. Moran*, 151 Ariz. 378, 728 P.2d 248 (1986).

4. Child Abuse Syndrome

An oft-related crime and charge is child abuse. Child abuse syndrome evidence is admissible. *State v. Moyer,* 151 Ariz. 253, 727 P.2d 31 (App.Div.2 1986).

5. Defendant's Sexual History

Defendant's prior similar sexual misconduct (including forced heterosexual intimate contact) may well be admissible in various sexual assault, sodomy, and child molestation cases, and is not limited only to prior “perverted” behavior long held to be the rule. *State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865

(2004).

See *State v. Day,* 148 Ariz. 490, 715 P.2d 743, 747 (1986) (eight rapes and several attempts in sixteen month period were sufficiently similar and near in time to be admissible).

Rule 404(c), subsection (1)(B) modified standing case law to remove the requirement that an expert be required in all cases where there was a separation of time between the past sexual behavior in question. While one may be required, the state just must show that there is a reasonable basis to connect the behavior with the accusation in question. See "Comment to 1997 Amendment" for explanation.

See also *State v. Roscoe,* 145 Ariz. 212, 700 P.2d 1312 (1984) (similarities outweighed 10 year difference in children's age) and *State v. LaMountain,* 125 Ariz. 547, 611 P.2d 551 (1980).

B. Complete Story - *Res Gestae*

Although the complete story or *res gestae* exception is not mentioned by Rule 404(b), it is also an exception to the rule against admitting other bad acts. The jury is entitled to have the crime set in its surrounding circumstances. If evidence must be admitted in order for the jury to understand the crime, then the evidence is admissible, even though it may also reveal other bad acts, another offense or misconduct. *State v. Mincey,* 141 Ariz. 425, 687 P.2d 1180 (1984). *State v. Johnson,* 121 Ariz. 545, 592 P.2d 379 (App.Div.2 1979); *State v. Rodriguez,* 131 Ariz. 400, 641 P.2d 888 (App.Div.2 1982).

C. Motive

Motive, although not an element of the crime, has some relevancy in the determination of whether the defendant's guilt. Motive supplies the reason that nudges the will and prods the mind to indulge the criminal intent. When using other acts to establish a motive, two evidentiary steps are involved. Evidence of other crimes is admitted to show that the defendant has a reason for having the requisite state of mind to do the act charged. From this mental state, it is inferred that he committed the act. The State, therefore, may show prior crimes that show a motive for the crime charged. This evidence may in turn serve as evidence of the identity of the doer of the crime charged. This evidence may in turn serve as evidence of the identity of the person who committed the crime, or of deliberateness, malice or a specific intent constituting an element of the crime.

Motive must be more than general motive, such as gaining money through a bank robbery and burglary of a home in a rich area. The two crimes must be sufficiently related.

Examples: Evidence was properly admitted that defendant was charged with murder at the time his wife helped him escape, because the motive for the accused robberies with was to get a car and money for the escape. *State v. Ferguson*, 120 Ariz. 345, 586 P.2d 190 (1978). Compare with *State v. Mulalley*, 127 Ariz. 92, 618 P.2d 586 (1980), where the jury could be told that defendant was on trial when he committed the charged assault, but it was (harmless) error to tell the jury for what crime he was being tried when he committed the charged assault

D. Identity, Plan

Where the identity of the defendant is the question in issue, any [emphasis supplied] fact which tends to establish the identity has probative value and if offered for that purpose it is receivable. Other acts or crimes may be shown if they are relevant, regardless of their criminal character.

State v. Castaneda, 150 Ariz. 382, 390, 724 P.2d 1, 9 (1986), quoting *State v. Francis,* 91 Ariz. 219, 371 P.2d 97 (1962).

Where the crime is proven, but the identity of the perpetrator is in doubt, evidence which incidentally discloses other crimes will be admitted if it has a logical tendency to show the identity of the defendant. Identity is a consequential fact which may be proven indirectly by proof of motive or design or plan. Sometimes the proffered evidence relates directly to the identity, as when it consists of a photograph or testimony relating thereto, or a handwriting specimen, or an object associating the defendant with the crime, or the testimony of a witness called for identification purposes.

Example 1: The evidence of prior drug dealings where no drug charges were filed was "helpful to a determination of motive, intent, knowledge orabsence of mistake or accident by establishing the background in which were set the events culminating in the shooting. We also believe the evidence was admissible to complete the story of the crime." *State v. Mincey,* 141 Ariz. 425, 433, 687 P.2d 1180, 1188 (1984).

Example 2: *State v. Roscoe,* 145 Ariz. 212, 700 P.2d 1312 (1984) (modus operandi used to prove identity).

Example 3: Evidence that an undercover officer assigned to get "known dealers" of heroin had seen defendant in his area about ten times, and defendant asked if the officer wanted "another one" when the officer asked for heroin, was properly admitted to prove defendant's identity. *State v. Padilla,* 122 Ariz. 378, 595 P.2d 170 (1979).

Often defendant's identity is proven through evidence showing a common plan or scheme. See generally *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980). The issue in identity and plan cases is whether defendant committed the offense at all. Proof that defendant committed the instant charge is made by proving other similar crimes, where defendant was identified as the perpetrator. The basic test for admissibility under this common plan or scheme exception is that the "[s]imilarities between the offenses…must be in those important aspects where normally there could be expected to be found differences." *State v. Akins*, 94 Ariz. 263, 266, 383 P.2d 180, 182-83 (1963). See also *State v. Miller,* 129 Ariz. 465, 632 P.2d 552 (1981). The trial court must also consider differences between the cases.

Example 1: The traffic stop seizure of a sawed-off shotgun completed the story of a robbery; evidence of a latter robbery was admissible to show a common scheme or plan and to identify the appellant as the perpetrator of a previous robbery as well as the robbery in question. *State v. Rosthenhausler,* 147 Ariz. 486, 711 P.2d 625 (App.Div.2 1985).

Example 2: See generally *State v. Huey*, 145 Ariz. 59, 699 P.2d 1290 (1985) (prior "bondage" rape admissible).

Example 3: Defendant convicted of robbery, held: where only areas of similarity between subject robbery and armed robbery involving defendant and four others 42 days later were the use of guns, use of getaway vehicles, and fact that they both occurred when no customers were present,evidence of subsequent act did not fall under common plan or scheme exception, where the areas of similarity were not areas where dissimilarity would be expected. *State v. Moore,* 108 Ariz. 215, 495 P.2d 445 (1972). See also *State v. Jones*, 26 Ariz.App. 68, 546 P.2d 45 (App.Div.1 1976).

Another type of common plan is where the bad acts were so interrelated that evidence of the bad act is necessary to complete the story of the crime (res gestae). See *Mincey, supra*.

E. Intent, Preparation, Lack of Mistake or Accident, Knowledge

Intent is at issue where defendant committed the offense but denies having the requisite criminal intent, or where the State must prove a specific intent. The State must prove what defendant's state of mind was, and evidence showing this is admissible even if it involves proof of other criminal acts, so long as the other bad acts are not too misleading or prejudicial. "Intent is frequently proved by evidence of other criminal acts of the same character, because the recurrence of an act controverts a claim that it was done by accident or mistake." *State v. Rose,* 121 Ariz. 131, 136, 589 P.2d 5, 10 (1978). *State v. Via,* 146 Ariz. 108, 704 P.2d 238 (1985); *State v. Huey,* 145 Ariz. 59, 699 P.2d 1290 (1985). Defenses which raise intent include lack of intent, intoxication, self-defense, insanity, etc. Evidence that shows intent includes preparation; proving intent negates the defenses of accident or mistake and proves knowledge.

Example 1: Evidence was properly admitted that defendant gave false identification when stopped for a traffic violation prior to the crime, and that one license plate was covered and the other was in the trunk when the same officer arrested him after the crime. The evidence showed plan or preparation, which in turn showed intent to commit the charged burglary. *State v. Rose, supra.*

Example 2: After a witness to a burglary had been knocked unconscious by a co-participant, defendant walked up and gratuitously killed the witness with a knife thrust. Evidence that the victim had a wallet before he was stabbed, and not afterwards, was admissible to show that defendant intended to participate in the charged burglary, even though robbery was not charged. *State v. Lulan,* 124 Ariz. 365, 604 P.2d 629 (1979).

Example 3: Admission of evidence that defendant shot her first husband was reversible error in her trial for shooting her second husband. However, evidence that five months before the second killing she attempted to run over the second husband with a car was admissible to show intent. *State v. Denny,* 27 Ariz.App. 354, 555 P.2d 111 (App.Div.1 1976).

Lack of knowledge is commonly raised in defense of drug cases or in the insanity defense. Be sure that the bad act evidence will prove knowledge before admitting it.

Example 1: Evidence of a previous extortion showed intent in the charged extortion. *State v. Frustino,* 142 Ariz. 288, 689 P.2d 547 (App.Div.1 1984).

Example 2: Evidence that defendant didn't show surprise when heroin was extracted from a package of cigarettes he passed to an undercover officer, didn't express regret or disassociate himself from the transaction and asked for a "taste" of the heroin was admissible to show defendant intended to participate in the transaction, and knew there was heroin involved. The story was completed. *State v. Price,* 123 Ariz. 166, 598 P.2d 985 (1979).

Example 3: Defendant mentioning drugs in direct or slang terminology, reference to him possessing a pistol earlier in the day, reference to defendant recognizing one of the persons involved in the deal and defendant talking of delivering heroin back east showed guilty knowledge and intent, completed the story of the crime, and rebutted the innocent

bystander defense. *State v. Youtsey,* 116 Ariz. 527, 570 P.2d 214 (App.Div.1 1977).

Example 4: Evidence that defendant's other child had been burned by a third party was properly admitted in defendant's trial for disciplining the victim by putting her in boiling water, to show knowledge of the possible consequences. *State v. Parra,* 121 Ariz. 107, 588 P.2d 849 (App.Div.2 1978).

III. CASES

A. Error: Harmless, Invited And Reversible

The guiding principle for harmless error: if it appears beyond a reasonable doubt that the error did not contribute to the outcome. *State v. Moore,* 222 Ariz. 1, 213 P.3d 150 (2009).

Defendants were charged with armed robbery. The case was reversed because the court admitted evidence that drugs were found on one co-defendant and paraphernalia was found on the other. The state's theory that drugs were the motive for the robbery was destroyed because there was no showing defendants did not have the drugs and paraphernalia before the robbery. *State v. Bolorcuez,* 151 Ariz. 611, 729 P.2d 965 (App.Div.1 1986).

The court committed error by admitting evidence that the officers who conducted surveillance of the defendant and saw him commit a burglary were members of the "major offenders unit," and the prosecutor committed error when he argued that the defendant "is good at what he does," which implied that the defendant had committed past crimes. However, such error was harmless because of the overwhelming evidence against him. *State v. Gamez,* 144 Ariz. 178, 696 P.2d 1327 (1985).

Remarks of a prosecution witness that he knew defendant was on probation for similar incidents with another woman, and that the defendant was in the massage parlor business, were held to be only harmless error. *State v. Salzman,* 139 Ariz. 521, 679 P.2d 544 (App.Div.2 1984).

Testimony that defendant was a narcotics violator was harmless since he took the stand and admitted numerous narcotics violations. Any error was harmless because of defendant's admissions about prior criminal activity. *State v. Celaya,* 135 Ariz. 248, 660 P.2d 849 (1983).

Defendant was not prejudiced by a witness saying that he lacked knowledge that defendant was dealing drugs. *State v. Mincey,* 130 Ariz. 389, 636 P.2d 637 (1981).

Defendant, in a sexual assault case, was not harmed when an officer testified that she worked for a sex crimes unit and that she recognized defendant from a composite sketch made from the victim's description. *State v. Grier,* 129 Ariz. 279, 630 P.2d 575 (App.Div.1 1981).

Evidence was harmless that defendant was on trial for sexual assault when he committed the charged assault, since the evidence of the charged assault was overwhelming. *State v. Mulalley,* 127 Ariz. 92, 618 P.2d 586 (1980).

Evidence that defendant fired his pistol into a refrigerator after threatening people was improperly admitted; however, the error was harmless since the admitted evidence was less virulent than other evidence which was properly admitted, and the bad evidence was not mentioned in arguments. *State v. Watkins,* 126 Ariz. 293, 614 P.2d 835 (1980).

Testimony that the undercover agent got defendant's address by buying heroin from him indirectly, through a third party was not hearsay. Failure to object on any grounds except hearsay waived any other error. *State v. Flores,* 124 Ariz. 310, 603 P.2d 937 (App.Div.2 1979). But, see disagreement with this holding in *State v. Simms*, 176 Ariz. 538, 863 P.2d 257 (App.Div.1 1993).

Asking an officer if the prosecutor had told the officer that the defendant had a long record was reversible error. *State v. Holsinger*, 124 Ariz. 18, 601 P.2d 1054 (1979).

Testimony about "mug-shots" is reversible error even without a defense objection. *State v. Cross,* 123 Ariz. 494, 600 P.2d 1126 (App.Div.2 1979).

Admission of evidence that defendant talked about stealing a car was not grounds for a mistrial. A statement that defendant said he didn't have a gun because he was convicted - whereupon the witness interrupted himself - was invited error. *State v. Lawrence,* 123 Ariz. 301, 599 P.2d 754 (1979).

Mention that defendant's car had been in some offense, perhaps a traffic violation, and had been impounded was not so prejudicial as to require a mistrial; defendant later admitted his record to show the officers had motive to frame him. *State v. Smith,* 123 Ariz. 243, 599 P.2d 199 (1979).

Failure to object to prior bad acts evidence followed by cross-examination about the bad acts waived any error in admitting the bad acts. *State v. Bustamonte,* 122 Ariz. 162, 593 P.2d 912 (App.Div.1 1978).

Reference to a third victim in opening statement was not error since the four-year-old victim had not yet been declared incompetent and charges involving molesting that victim were before the jury. *State v. Bowie,* 119 Ariz. 336, 580 P.2d 1190 (1978).

B. Sex Crimes

1. Victim's Sexual History

See *State v. Augilar*, 209 Ariz. 40, 97 P.3d 865 in Section II.A.1.

A stricken answer that a witness had a sexual relationship with the victim, evidence that the victim forced him to rehire her or face exposure, the victim's statement that she had a "boyfriend-girlfriend" relationship with the witness, and defendant's failure to comply with *Pope* meant that the court did not abuse its discretion in barring further evidence of the witness's sexual relationship with the victim. A footnote cites *Pope*, and states "[t]he Court of Appeals, in *State v. Quinn,* 121 Ariz. 582, 592 P.2d 778 (App.Div.1 1978), held that failure to request a *Pope* hearing justifies excluding cross-examination of a rape victim's prior sexual conduct." *State v. Reinhold,* 123 Ariz. 50, 54, 597 P.2d 532, 536 (1979).

The *Pope* requirements apply to impeachment evidence offered to prove things other than character or reputation, including motive. Defendant's failure to comply with *Pope,* and failure to show that the victim was trying to conceal having sex with her boyfriend by claiming rape, meant exclusion of prior un-chastity evidence was not an abuse of discretion. *State v. Grice*, 123 Ariz. 66, 597 P.2d 548 (App.Div.2 1979).

2. Use of Bad Acts to Show Emotional Propensity for Sexual Deviance

In case of sexual conduct with a minor, child molestation, and furnishing obscene or harmful items to minors, testimony that the defendant asked the victim and another minor to masturbate in front of him and to perform other sex acts was admissible in that it showed emotional propensity and as evidence of a plan. *State v. Grainge*, 186 Ariz. 55, 918 P.2d 1073 (App.Div.1 1996).

The general rule is that prior bad acts are admissible to show emotional propensity for sexual aberration. *State v. Roscoe,* 145 Ariz. 212, 700 P.2d 1312 (1984).

The trial court correctly admitted evidence that defendant had been convicted of breach of the peace for similar incidents where he exposed himself to children nine months before the charged crimes. *State v. Romero,* 130 Ariz. 142, 634 P.2d 954 (1981).

A 54-year-old man french-kissing fifth and sixth grade girls involves sexual aberration; admission without psychiatric testimony was proper since the acts were similar in nature and occurred within weeks of the charged offense. *State v. Bailey,* 125 Ariz. 263, 609 P.2d 78 (App.Div.1 1980).

The Court held admissible defendant Treadaway's (see below) alleged attack upon a boy three months prior to the occurrence of the crimes charged - they were similar to and occurred near in time to the crime charged. The Court noted that the *Treadaway* decision controls if the prior act is either not similar to the crime charged or not near in time. If either of these situations exists, admission of the act is reversible error unless and until there is reliable expert medical testimony that such a prior act tends to show a continuing emotional propensity to commit the act charged. *State ex rel LaSota v. Corcoran,* 119 Ariz. 573, 583 P.2d 229 (1978).

Defendant was convicted of child molesting. Prior similar acts committed by the defendant two years and five years before the instant prosecution upon the same victim were held not to be too remote to show lewd disposition or intent of the defendant towards the prosecuting witness. *State v. Garner,* 116 Ariz. 443, 569 P.2d 1341 (1977). See also *State v. Van Winkle*, 106 Ariz. 481, 478 P.2d 105 (1970) and *State v. Finley,* 108 Ariz. 420, 501 P.2d 4 (1972) where the Court admitted evidence of other sex crimes committed with the same victim as showing a system, plan or scheme to engage in sexual aberrations.

Defendant was charged with murder/child molestation. Evidence of acts that defendant had committed upon a 13-year-old boy three years earlier was held inadmissible because incidents were neither similar nor near in time to the crime charged. When such situation exists, admission of the act is reversible error unless and until there is reliable expert medical testimony that the prior act tends to show a continuing emotional propensity to commit the act charged. *State v. Treadaway,* 116 Ariz. 163, 568 P.2d 1061 (1977).

Defendant was convicted of burglary and child molestation. Evidence that defendant committed similar act two weeks before on another victim was admissible to show the accused had propensity to commit perverted acts. Even though prior bad act victim was unable to positively identify the defendant, State did lay a sufficient foundation for the admissibility of this evidence. *State v. Miller,* 115 Ariz. 279, 564 P.2d 1246 (1977).

Defendant was charged with attempted rape. Evidence that while attempting to rape the victim, victim's 82-year-old mother interrupted and was raped instead held admissible to show unusual sexual propensities of the defendant and as part of the complete story. *State v. Wallen,* 114 Ariz. 355, 560 P.2d 1262 (1977).

Defendant was convicted of indecent exposure. Evidence of defendant's admitted prior indecent exposure

held admissible to show the defendant's propensity toward sexual aberration. *State v. Gates,* 25 Ariz.App. 241, 542 P.2d 822 (App.Div.1 1975).

Defendant was convicted of child molestation. Evidence showing four other incidents of molestation which took place within a three-month period before and after act being tried was held admissible to show that defendant has a propensity for abnormal sex acts. *State v. McFarlin,* 110 Ariz. 225, 517 P.2d 87 (1973).

The fact that in near past, one who is charged with a crime stemming from a specific emotional propensity for sexual aberration has given way to unnatural proclivities has a direct bearing upon the ultimate issue whether in case being tried he is guilty of particular unnatural acts of passion. *State v. Phillips,* 102 Ariz. 377, 430 P.2d 139 (1967) and *State v. McDaniel,* 80 Ariz. 381, 298 P.2d 798 (1956).

C. Complete Story

1. Acts of Defendant

In child molestation and sexual conduct with a child case, evidence that defendant struck the victim in the stomach was not evidence of a similar event, nor was it "so connected with the crime…that proof of one incidently [sic] involves the other or explains the circumstances of the crime." *State v. Alatorre*, 191 Ariz. 208, 213, 953 P.2d 1261, 1266 (App.Div.1 1998), quoting *State v. Johnson*, 116 Ariz. 399, 400, 569 P.2d 829, 830 (1977).

Evidence of uncharged burglary of place forged checks were stolen from was admissible to complete the story. *State v. Webb,* 149 Ariz. 158, 717 P.2d 462 (App.Div.2 1985) (not shown defendant was burglar).

Evidence that defendant claimed to be a manager for Fleetwood Mac and left his "guests" to pay the tab completed the story to show defendant's fraudulent intent when he rented limousines to transport the "guests" to the restaurant. *State v. Brokaw*, 134 Ariz. 532, 658 P.2d 185 (App.Div.2 1982).

Evidence was properly admitted that the sister of the burglary victim found defendant trying to break into another house one and one-half hours after the charged burglary and that the sister watched until defendant was arrested. *State v. Rodriguez,* 131 Ariz. 400, 641 P.2d 888 (App.Div.2 1982).

See *State v. Mincey*, 130 Ariz, 389, 636 P.2d 637 (1981).

The victim could testify that defendant said all of his other victims lived and that he got away with it once. The threats explained why that victim did not resist and completed the story of the crime. *State v. Sanchez,* 130 Ariz. 295, 635 P.2d 1217 (App.Div.2 1981).

The fact defendant was on trial for sexual assault and kidnapping charges was not admissible to "complete the story" when he was tried for an assault committed during the sexual assault trial. The admission of the evidence was harmless in light of overwhelming evidence. *State v. Mulalley,* 127 Ariz. 92, 618 P.2d 586 (1980).

Testimony about defendant's pistol and the firing of it, and introduction of the pistol itself were all admissible to complete the story of an aggravated assault. *State v. Watkins,* 126 Ariz. 293, 614 P.2d 835 (1980).

Evidence that defendant traded marijuana for the stolen guns he was charged with possessing was admissible to complete the story of the crime. *State v. Jones,* 124 Ariz. 284, 603 P.2d 555 (App.Div.2 1979).

State v. Price, 123 Ariz. 166, 598 P.2d 985 (1979) (See Section II. E., *supra*).

Evidence that defendant robbed the rape victim and bought cigarettes and beer with the money was admissible to complete the story of the charged rape. *State v. Reinhold,* 123 Ariz. 50, 597 P.2d 532 (1979).

Defendant's boasting that he had shot someone was admissible under the complete story where he was trying to trade killings after being unable to come up with the cash to get his parents killed so he could inherit. (The "hit man" was an F.B.I. agent.) *State v. Johnson,* 121 Ariz. 545, 592 P.2d 379 (App.Div.2 1979).

State v. Rose, 121 Ariz. 131, 589 P.2d 5 (1978) (See section II. E., *supra*).

Evidence that defendant and another bought marijuana was properly admitted to give the jury the "total picture" where the officer and the companion were struggling over the marijuana when defendant shot the officer. *State v. Trujillo*, 120 Ariz. 527, 587 P.2d 246 (1978).

Defendant was charged with armed robbery and attempted murder. Evidence of earlier kidnapping of automobile owner, auto theft, and robbery of auto owner was admissible to help identify the defendant as the person who subsequently robbed and shot the store clerk as well as to give the jury the complete story. *State v. Myers,* 117 Ariz. 79, 570 P.2d 1252 (1977).

State v. Youtsey, 116 Ariz. 527, 570 P.2d 214 (App.Div.1 1977) (See Section II. E., *supra*).

State v. Wallen, 114 Ariz. 355, 560 P.2d 1262 (1977) (See section III. B.2., *supra*).

Defendant was accused of robbery. Evidence concerning a shooting which occurred in connection with an extortion attempt was admissible as part of the evidence binding the defendant to the robbery and as part of the foundation for victim's identification of the defendant. *State v. Labarre*, 114 Ariz. 440, 561 P.2d 764 (1977).

Defendant was charged with kidnapping while armed with a gun. Evidence that defendant kidnapped his wife, that they were recently separated, and that he was married to two women was held admissible to show complete story of crime. The bigamy was inextricably entwined with the kidnapping charge. *State v. Belkin,* 26 Ariz.App. 513, 549 P.2d 608 (App.Div.2 1976).

Defendant was convicted of two counts of robbery. Evidence that defendant attempted to cash a forged money order which was payable to one of the victims of the robbery was held admissible since the money order was taken in the robbery and it was part of the complete story of the crime. The evidence was also relevant as it went to the question of the defendant's identity and involvement in the robbery. *State v. Noles,* 113 Ariz. 78, 546 P.2d 814 (1976).

Defendant was charged with armed kidnapping. Evidence that victim of crime was ultimately killed was held admissible to complete the story of crime and explain why victim was not called as a witness. *State v. Hinkle,* 26 Ariz.App. 561, 550 P.2d 115 (App.Div.2 1976).

Defendant was charged with burglary. Evidence of defendant's prior conduct, while under surveillance, showing that defendant had gone into several stores and stolen food, was held admissible to complete the story of the crime. *State v. Madrid,* 113 Ariz. 290, 552 P.2d 451 (1976).

Defendant was charged with rape. Evidence showing oral sex acts or declarations relating to sex acts made by defendant at time of gang rape was held admissible to complete the story. *State v. Smiley,* 27 Ariz.App. 314, 554 P.2d 910 (App.Div.1 1976).

Defendant was charged with murder. Evidence that defendant "fixed up" with drugs before offense, that he used prostitute to get victim in situation to kill victim, and that defendant received the earnings of his prostitute was held admissible as being so entwined with the homicide that it was part of the complete story. *State v. Richmond,* 114 Ariz. 186, 560 P.2d 41 (1976).

State v. Vandeveer, 23 Ariz.App. 331, 533 P.2d 91 (1975) (See section III. H., *infra*).

Evidence of other crimes defendant committed in the same neighborhood on the same night as the offense he was charged with was held admissible as part of the complete story because proof of these acts incidentally involved the other crimes and explained the circumstances of the crime. *State v. Jackson,* 112 Ariz. 149, 539 P.2d 906 (1975).

Under the complete story exception, events occurring at a service station where the defendant was arrested for possession of burglary tools and giving false information to a police officer constituted relevant evidence in prosecution of defendant-for burglarizing an adjacent service station the same night. *State v. Allen,* 111 Ariz. 546, 535 P.2d 3 (1975).

State v. Collins, 111 Ariz. 303, 528 P.2d 839 (1974) (See section III. F., *infra*).

State v. Lockner, 20 Ariz.App. 367, 513 P.2d 374 (App.Div.1 1973). General rule. See also *State v. Albe*, 10 Ariz.App. 545, 460 P.2d 651 (App.Div.1 1969); *State v. Mahoney,* 106 Ariz. 297, 475 P.2d 479 (1970); *State v. Hutton,* 109 Ariz. 356, 509 P.2d 626 (1973).

Defendant was charged with murder. Evidence that defendant allegedly committed other murders to keep latest victim from informing authorities of his boastful admissions concerning the murder for which he was currently being prosecuted was held admissible because of definite connection between the two crimes. *State v. Schmid,* 107 Ariz. 191, 484 P.2d 187 (1971).

Defendant was convicted of administering a narcotic to a minor. Evidence that defendant gave himself a "fix" before administering drug to victim on each occasion was held admissible as it was so blended and connected with crime charged that proof of one incidentally explained circumstances of the other. *State v. Rivera,* 103 Ariz. 458, 445 P.2d 434 (1968).

Murder prosecution. Evidence offered by robbery victim that defendant stole guns identified as murder weapons from him was held admissible as being directly linked with the offense charged. *State v. Hudgens,* 102 Ariz. 1, 423 P.2d 90 (1967).

Murder prosecution. Evidence that defendant was caught molesting decedent's wife, was stabbed by decedent, returned later and shot and killed decedent was held admissible as it was so entwined with crime for which defendant was charged that jury could not have full understanding of the circumstances without such evidence. *State v. Foggy,* 101 Ariz. 459, 420 P.2d 934 (1966).

Defendant's threat to commit suicide one month before assault on wife and son was too remote and

disconnected to complete the story of the crime. *State v. Willits,* 2 Ariz.App. 443, 409 P.2d 727 (Ariz.App. 1966).

Important case. Prosecution for sale of narcotics. Where defendant sold can of what witness believed was marijuana to person accompanying witness, and sold 1/2 can to witness, witness could testify about sale to person accompanying him. Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incident involved the other or explains the circumstances of the crime. The jury is entitled to have the alleged crime fixed in the background of the accompanying events. *State v. Villavicencio,* 95 Ariz. 199, 388 P.2d 245 (1964).

Defendant was convicted of illegal sale of marijuana. Evidence showing defendant's attempted sale of marijuana to others immediately preceding defendant's sale to the agent, in prosecution for sale to the agent, admissible under the "complete story principle." *State v. McGilbry,* 96 Ariz. 84, 392 P.2d 297 (1964).

2. Complete Story (Acts of Others)

The acts of other inmates concealing contraband was admissible to complete the story of defendant promoting prison contraband by storing gunpowder in a balloon up his anus. *State v. Bloomer,* 156 Ariz. 276, 751 P.2d 592 (App.Div.2 1987).

Defendants were not entitled to discover internal affairs records of alleged complaints of officers' over aggressiveness, since *inter alia* defendant could not use evidence of other bad acts under Rule 404(b) to show that the officers were "acting in conformity with a violent and aggressive character." *State v. Superior Court,* 132 Ariz. 374, 645 P.2d 1288 (App.Div.2 1982).

Defendant was convicted of rape. Evidence that men other than defendant and the co-defendants successively had sexual relations with the victim during the same evening in the same room was held admissible under "complete story principle" even though what is revealed is prejudicial. *State v. Williams,* 27 Ariz.App. 279, 554 P.2d 646 (App.Div.1 1976). See also *State v. Smiley,* 27 Ariz.App. 314, 554 P.2d 910 (App.Div.1 1976).

Defendant was convicted of ADW. Evidence that onlookers threatened police and at least one fired a gun during struggle to arrest defendant was admissible under complete story principle. *State v. Evans,* 110 Ariz. 380, 519 P.2d 182 (1974).

Where it was necessary for jury to know that defendant was in police wagon with robbery victim at time of alleged robbery in order for jury to have complete story, evidence that defendant and his two companions were "arrested for various crimes" was relevant and admissible. *State v. Byrd,* 109 Ariz. 387, 509 P.2d 1034 (1973).

Evidence was properly admitted that defendant had conversations, then went from tavern to alley, prior to his arrest for possession. The evidence suggested he was selling drugs and completed the story. *State v. Hutton,* 109 Ariz. 356, 509 P.2d 626 (1973).

D. Entrapment

Not error to admit evidence of sale of heroin 4 to 7 years prior to trial. *State v. Korte,* 115 Ariz. 517, 566 P.2d 318 (App.Div.2 1977).

Agent was permitted to testify about a conversation with defendant concerning a separate marijuana

transaction. *State v. Young,* 115 Ariz. 162, 564 P.2d 385 (1977).

Evidence of prior bad acts admissible when the defendant asserts the defense of entrapment. *State v. Astorga,* 26 Ariz.App. 133, 546 P.2d 1142 (App.Div.2 1976).

Defendant charged with possession of dangerous drugs for sale. Evidence relating to possession and sale of another drug two days earlier for which he was not charged was held admissible to show intent. *State v. Petralia,* 110 Ariz. 530, 521 P.2d 617 (1974).

Defendant was convicted of transportation of marijuana. Evidence concerning prior sale of marijuana by defendant two years earlier would have been admissible on issue of intent but here such evidence was hearsay. *State v. Cox,* 110 Ariz. 603, 522 P.2d 29 (1974).

Defendant was convicted of unlawful sale of marijuana. Evidence that defendant approached agent three weeks after alleged offense and asked agent if he wanted "more stuff" was admissible to rebut entrapment defense. *State v. Turner,* 104 Ariz. 469, 455 P.2d 443 (1969).

Defendant was charged with possession and sale of marijuana. Held: evidence that defendant had made a sale of marijuana, had smoked marijuana with agents, and had supplied marijuana which was sold by one of his companions, all within a few days before sale in question, was admissible. *State v. Vallejos,* 89 Ariz. 76, 538 P.2d 178 (1968).

E. Subsequent Acts

Defendant was convicted of kidnapping, two first degree rape offenses, burglary and attempted burglary. Admission of evidence that defendant was arrested while attempting a burglary in the same apartment complex where 29 days previously he had kidnapped and raped a tenant was reversible error in that the State did not establish with certainty the defendant's responsibility for that crime. *State v. Henderson,* 116 Ariz. 310, 569 P.2d 252 (App.Div.1 1977).

Defendant convicted of child molestation. Evidence of a subsequent child molestation was admissible where there was sufficient similarity of *modus operandi*, even though the second child did not positively identify the defendant. Both molestations occurred in the same manner and same neighborhood. *State v. Miller,* 129 Ariz. 465, 632 P.2d 552 (1981).

Where identity of defendant is question in issue, subsequent acts or crimes may be shown if relevant, but here, nothing in subsequent sale could identify the defendant as the person who made the sale for which defendant was convicted. *State v. Tuell,* 112 Ariz. 340, 541 P.2d 1142 (1975).

Subsequent "till-tapping" act was admissible to show intent. Intent may be established by subsequent acts because it is based on the idea that similar results do not usually occur through abnormal causes and that recurrence of a particular act similarly tends to negate accident, inadvertence or other innocent mental state. *State v. Lee,* 25 Ariz.App. 220, 542 P.2d 413 (App.Div.1 1975).

Defendant was convicted of rape and burglary. Evidence of acts defendant committed approximately one week after these incidents, i.e., defendant was found peering into motel window and he had in his possession a knife similar to that used in rape, was admissible as tending to show a common plan, scheme or design. *State v. Kelly,* 111 Ariz. 181, 526 P.2d 720 (1974).

Evidence of a subsequent crime cannot be used to establish knowledge in a prior instance. Proof of knowledge requires a happening or event that would probably have resulted in some sort of knowledge or

warning and this warning or knowledge must probably have led to knowledge in question. *State v. Hays,* 17 Ariz.App. 202, 496 P.2d 628 (App.Div.1 1972).

Defendants were convicted of escape. Evidence that following escape from county jail one defendant stole a car was proper for purposes of showing facts of flight. *State v. White,* 16 Ariz.App. 514, 494 P.2d 714 (App.Div.2 1972).

Fact that defendant failed to appear at time originally set for his trial, that bench warrant was issued for his arrest for FTA, and that extradition proceedings were initiated in another State was properly admitted in prosecution of defendant for grand theft as tending to show fact of flight. *State v. Roderick,* 9 Ariz.App. 19, 448 P.2d 891 (Ariz.App. 1968).

F. Motive

Testimony by different victims was admissible despite differences in false representations to show motive *inter alia*. *State v. Agnew*, 132 Ariz. 567, 647 P.2d 1165 (App.Div.2 1982). *State v. Mincey,* 130 Ariz. 389, 636 P.2d 637 (1981).

Any error in admitting evidence that the thief/state's witness met defendant while selling him stolen goods was waived by failure to object. Had there been an objection the evidence would "most likely have been admitted" to prove motive, intent, etc. *State v. Smith,* 122 Ariz. 58, 593 P.2d 281 (1979).

Defendant was convicted of robbery and burglary. The two prior bad acts of defendant; 1) one month earlier defendant beat victim and demanded money; 2) two weeks earlier, defendant demanded money from victim at knifepoint after breaking down victim's door, were admissible to show defendant's motive and intent when he kicked open defendant's door, hit him, and demanded money. *State v. Jackson,* 121 Ariz. 277, 589 P.2d 1309 (1979).

It was error to admit defendant's prior bad acts to show propensity to shoot her husband. But evidence that the defendant had attempted an assault on her present husband (victim of case) with an automobile five months before shooting (for which she was presently on trial) was properly admitted to show motive, malice and intent. *State v. Denny*, 27 Ariz.App. 354, 555 P.2d 111 (App.Div.1 1976).

In armed robbery and murder prosecution, evidence of defendant's addiction to heroin was relevant to his motive for the theft of the drug from the victim prior to the shooting. Evidence also admissible to complete the story. *State v. Collins,* 111 Ariz. 303, 528 P.2d 829 (1974).

In prosecution for armed kidnapping, kidnapping, assault with a deadly weapon, assault with intent to commit felony, and several other charges, arising out of attempted jailbreak, multiple convictions on the part of the accused were admissible on the issue of motivation to try to escape. *State v. Moore*, 110 Ariz. 404, 519 P.2d 1145 (1974).

Where victim of homicide knew defendant, knew details of two prior killings defendant had committed, and had on a number of occasions used that knowledge against the defendant in a threatening manner, evidence that the defendant had killed two other persons was admissible to show defendant's motive for killing the victim. *State v. Schmid,* 109 Ariz. 349, 509 P.2d 619 (1973).

Defendant was convicted of first degree murder of mother. Evidence that defendant's foster parents had warned him that if he wrote any more bad checks, they would turn him in to his parole officer to be sent back to A.S.P., and that defendant had written numerous checks on foster parents' checking account was properly admitted to show the defendant's motive for the crime charged. *State v. Hanna,* 99 Ariz. 346, 409 P.2d 47 (1965).

Defendant was convicted of first degree murder and assault with intent to commit murder. Evidence of sexual indignities committed on the victim's fiance after he was shot were relevant to show the defendant's motive in the killing. *State v. Narten,* 99 Ariz. 116, 407 P.2d 81 (1965).

G. Identity, Plan

Reference to other uses of the stolen credit card was proper under the common plan or scheme exception. Therefore, the court properly admitted defendant's confession, where he admitted the other frauds as well as admitting the charged fraudulent uses of the stolen credit card. *State v. Jahns*, 133 Ariz. 562, 653 P.2d 19 (App.Div.2 1982).

The trial court properly admitted evidence that defendant committed similar offenses against other children and plead guilty to breach of the peace nine months before the charged exposure. The similarities in the crime proved identity. *State v. Romero,* 130 Ariz. 142, 634 P.2d 954 (1981).

A similar incident where defendant made similar representations to the victim regarding the same tract of land was properly admitted to show a plan. *State v. Miller*, 128 Ariz. 112, 624 P.2d 309 (App.Div.1 1981).

Defendant, in drug prosecution, gave notice of defense of mistaken identification. Testimony that officers had contact with the defendant and had seen his photograph before the sales he was on trial for, that his duties consisted of making purchases from "known dealers", and that he had conversation with defendant concerning heroin was held admissible as it proved accuracy of identification of defendant by the officers. *State v. Padilla*, 122 Ariz. 378, 595 P.2d 170 (1979).

Evidence of another kidnapping, robbery, and auto theft was admissible to prove identity and complete the story of the charged attempted robbery, and attempted murder. *State v. Myers,* 117 Ariz. 79, 570 P.2d 1252 (1977).

Evidence that defendants, while under surveillance, entered stores, stole merchandise and then returned it for a refund; testimony of an accomplice on the M.O., and an officer to the surveillance was held admissible as showing a common plan or scheme. *State v. Pogue,* 113 Ariz. 478, 557 P.2d 163 (1976).

Defendant was convicted of robbery. Evidence of two other robberies, one before and one after the present charge was held admissible where robberies were of the same store and the same clerk, as such evidence shows a *modus operandi* and bolstered the witnesses' identification of the defendant. Where evidence is admitted to show identity, a greater degree of similarity is required than in the other exceptions, i.e., it is required that there be a high degree of similarity between the offenses and an element of uniqueness in the method of committing the crimes to give grounds for the inference that the crimes are committed by the same person. *State v. Jones,* 26 Ariz.App. 66, 546 P.2d 43 (App.Div.1 1976).

Defendant, charged with offering to sell heroin, set up defense of mistaken identification, i.e., that defendant and co-defendant were similar in appearance and that the officer mistook which one he had taken the heroin from. Evidence of a prior marijuana sale where defendant helped unload a large quantity was held inadmissible. There was no connection, factually or otherwise, between the earlier offense and the crime charged to aid the jury in identifying the defendant as the person possessing the heroin. *State v. Estrada,* 27 Ariz.App. 38, 550 P.2d 1080 (App.Div.2 1976).

Defendant was charged with armed robbery. Evidence that the defendant robbed the same Circle K one month later was admissible since the same clerk was present. The defendant challenged the validity of the

clerk's in-court identification. Other encounters with an individual under unusual circumstances will make identification easier and more certain. *State v. Jones,* 26 Ariz.App. 66, 546 P.2d 43 (App.Div.1 1976).

Defendant was charged with arson in connection with the burning of his home. Evidence that defendant had previously set fire to his auto, was in financial difficulties, claimed he was in same tavern when both fires occurred, that five gallon cans filled with flammable liquids were found at the scene of both fires, and that the defendant collected insurance after both fires was held admissible to prove identity through a distinctive *modus operandi*. *State v. Latino,* 25 Ariz.App. 66, 540 P.2d 1285 (App.Div.2 1975).

Defendant was convicted of unlawful sale of narcotics. Evidence that defendant participated in another subsequent sale was held inadmissible on question of identity where nothing in the subsequent act could identify the defendant as the person who made the sale for which the defendant was convicted. There was nothing novel in the acts which would aid in identifying the defendant as the guilty party. *State v. Tuell,* 112 Ariz. 340, 541 P.2d 1142 (1975).

Defendant was charged with rape and lewd and lascivious acts. Mere similarity between the crime charged and prior act is not sufficient, acts must have common features. There was no error in allowing evidence of a prior rape where in both cases defendant was casually acquainted with victim, his opening gambit was the same, rapes occurred in early morning, and both involved a sexual *tour-de-force. State v. Valdez*, 23 Ariz.App. 518, 534 P.2d 449 (App.Div.2 1975).

Defendant was convicted of offering heroin for sale. Evidence that defendant had previously sold heroin to same agent was admissible as evidence showing a system, plan or scheme embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other. *State v. Jaramillo,* 111 Ariz. 2, 522 P.2d 1079 (1974).

Defendant was convicted of rape and kidnapping. Evidence that two days after incident charged, defendant used similar M.O., i.e., defendant pointed gun at a witness through her car window and with difficulty drove her off in car with stick shift to rendezvous with some other men where they attempted to rape the witness, was held admissible. Both crimes were so related to each other that proof of one established the other. *State v. Downing,* 109 Ariz. 456, 511 P.2d 638 (1973).

Defendant was charged with rape. Evidence of second rape committed three months after rape charged was held admissible on issue of identity where rapist wore mask and gloves and carried a gun; told both victims their cars were needed; tied the hands of both victims and blindfolded them; one act of intercourse with each victim; rapist left immediately after rape; did not untie victims; no brutality; and victims described assailant's clothes in similar terms. *State v. Fierro,* 107 Ariz. 479, 489 P.2d 713 (1971).

H. Intent, Preparation, Lack Of Mistake Or Accident, Knowledge

Evidence of uncharged frauds was admissible to show knowledge and lack of mistake in the charged securities fraud. *State v. Agnew,* 132 Ariz. 567, 647 P.2d 1165 (App.Div.2 1982).

Evidence of prior drug dealing showed motive, intent, lack of mistake or accident and knowledge when defendant killed a narcotics officer during a buy/bust. *State v. Mincey,* 130 Ariz. 389, 636 P.2d 637 (1981).

Evidence that defendant had 55 matchboxes full of marijuana in his bedroom showed knowledge of possession of marijuana even though his girlfriend claimed she put the marijuana in defendant's jeans. *State*

v. Hines, 130 Ariz. 68, 633 P.2d 1384 (1981).

The prosecutor committed reversible error when he insinuated that defendant was a member of the Hell's Angels in order to show defendant's expertise with motorcycles. *State v. Ballantyne,* 128 Ariz. 68, 623 P.2d 857 (App.Div.2 1981).

Subsequent acts explained defendant's intent when he committed the charged child molesting. Defendant rubbed the victim in the groin area, later he stroked the victim in a bunk, said he wished the victim was his, and asked the victim to shine a light from a window (if the victim and another youth were alone). State v. Anderson, 128 Ariz. 91, 623 P.2d 1247 (App.Div.1 1980).

Evidence of a request made by defendant after the sale for a "taste" of the heroin was admissible. Defendant had denied knowing that it was heroin he delivered to the undercover officers. His lack of surprise at seeing the heroin and his request for a "taste" were probative of his motive and intent and were part of the "complete story." *State v. Price,* 123 Ariz. 166, 598 P.2d 985 (1979).

Defendant was charged with conspiracy to commit murder and attempted murder. Testimony that defendants' removal from their storage shed of stolen calculators and a shotgun was admissible on issue of criminal intent where defendants

claimed they simply did not want property of a third person around. The testimony was also admissible to show that the plot to kill was not a joke and that defendants had requisite criminal intent in that they removed items in case there was an investigation and search of premises after the murder. *State v. Kennedy,* 122 Ariz. 22, 592 P.2d 1288 (App.Div.2 1979).

Defendant was convicted of kidnapping and burglary. Evidence that defendant gave false identification at an accident shortly before burglary, and had concealed license plates when he was arrested shortly after burglary was admissible since it showed intent, preparation, and complete story of crime. Evidence of preparation discredits a claim that the act was done by mistake or accident, and sheds light on the defendant's intent. State v. Rose, 121 Ariz. 131, 589 P.2d 5 (1978).

Defendant, convicted of burglary and murder, testified he was at murder scene but did not participate. Evidence of defendant's prior kidnapping and assault of another person was admissible to prove defendant's intent upon entering murder victim's house where methods of entry were very similar and both crimes were attempted to regain stolen drugs. *State v. Swinburne,* 116 Ariz. 403, 569 P.2d 833 (1977).

Defendant, in murder prosecution, testified that he thought he had purchased the gun 3 to 4 weeks before the incident, thereby purchasing it with no specific use in mind. Evidence relating to Federal Firearms application which showed defendant lied about his heroin addiction and evidence of a threat to "kill pigs," were admissible to prove defendant's intent to kill (where defendant claimed self-defense) and to contradict defendant about the date he bought gun. *State v. Mincey,* 115 Ariz. 472, 566 P.2d 273 (1977).

In till tapping case where defendant claimed innocent intent, evidence of two prior and one subsequent offense committed by the defendant were admissible to show defendant's criminal intent. Striking similarities existed between the incidents, which showed the defendant's intent to decoy the victim while the theft occurred. *State v. Lee*, 25 Ariz.App. 220, 542 P.2d 413 (App.Div.1 1975).

Defendant was charged with attempted burglary. Circumstantial evidence connecting defendant to burglary of another office on other side of building where defendant was observed was admissible on issue of whether defendant possessed the intent to commit a felony or a theft in the office where he was seen

pushing on the outside door. *State v. Keith,* 24 Ariz.App. 275, 537 P.2d 1333 (App.Div.2 1975).

Defendant was convicted of burglary of a service station. Testimony relating to events which occurred at a service station, adjacent to the one burglarized where defendant was arrested for possession of burglary tools and giving false information and pleas of guilty to those charges were admissible to establish defendant's criminal intent and discredit the defendant's professions of innocence. *State v. Allen,* 111 Ariz. 546, 535 P.2d 3 (1975).

Defendant was convicted of possession of marijuana and possession of marijuana for sale. Evidence that co-defendant and defendant had made a prior sale of marijuana on the same night was admissible to show defendant's state of mind, to show the complete picture, and to show defendant's intent to sell marijuana. *State v. Vandeveer,* 23 Ariz.App. 331, 533 P.2d 91 (App.Div.1 1975).

Defendant was accused of possession of dangerous drugs for sale. Evidence relating to possession and sale of drugs two days earlier was admissible for purpose of showing defendant's intent in sale in question where defendant raised defense of entrapment and alibi. *State v. Petralia,* 110 Ariz. 530, 521 P.2d 617 (1974).

Defendant was convicted of two counts of second degree murder. Defendant testified that he did not threaten either victim. Evidence relating to incident occurring less than one month before the killings concerning the use of a knife by the defendant on one of the victims was admissible to show the jury the entire picture and to show the intent to commit assault with a knife, rather than "heat of passion." *State v. Tostado,* 111 Ariz. 98, 523 P.2d 795 (1974).